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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-311

LOUISIANA BANK & TRUST COMPANY
OF CROWLEY, LOUISIANA,
Petitioner,

versus

THE EMPLOYERS LIABILITY
ASSURANCE CORP., LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Petition has adequately recounted the decisions below.

JURISDICTION

Petitioner has invoked the jurisdiction of this court (1) because of an alleged conflict between the decision

complained of here and certain decisions of the Seventh and Eighth Circuits,[1] and (2) because the Court of Appeals allegedly erred in its finding of fact and interpretation of the law. Respondent submits that there is no conflict between the decision here and those of the Seventh and Eighth Circuits and that the court did not err in its finding of fact or conclusions of law. This case does not involve matters of national significance and there is no special nor important reason for this court to issue a writ of certiorari as requested.

QUESTIONS PRESENTED

1. Is there conflict between the holding of the Court of Appeals, applying the loan exclusion clause to an extension of credit on a collection draft and the decisions of the Seventh and Eighth Circuits in the cases cited in the Petition, which do not apply the loan exclusion clause to check kiting cases under the facts there presented?

2. May the court rely on the Stipulations of Fact contained in a pretrial order?

STATEMENT OF THE CASE

Petitioner is a bank to whom respondent issued a banker's blanket bond excluding from coverage any

1 *First National Bank of Decatur* v. *The Insurance Company of North America*, 424 F.2d 312 (7th Cir. 1970); *Pioneer Valley Savings Bank* v. *The Indemnity Insurance Company of North America*, 225 F.Supp. 404, aff'd 343 F.2d 634 (8th Cir. 1965); *United States for the Use of First Continental National Bank & Trust Company* v. *Western Contracting Corporation*, 341 F.2d 383 (8th Cir. 1965); and *Hartford Accident & Indemnity Company* v. *Federal Deposit Insurance Corp.*, 204 F.2d 933 (8th Cir. 1953).

loss resulting from nonpayment or default on a loan. Petitioner accepted seven drafts drawn by Rex Rice Mill on Connell Rice & Sugar Company. Bank required a note of Rex and extended credit to Rex for the face amount of the drafts even though all of the documents necessary to complete them were not then available or delivered to Bank. Interest was assessed from the date credit was extended. The drafts were later presented for collection to the purchaser and they were dishonored as "incomplete" or "incorrect". Rex was financially unable to repay the monies advanced and Bank looked to respondent on its bond.

In addition, Bank received from other banks certain sight drafts which had been drawn on Rex as purchaser of rough rice. Rex did not have funds in its account to cover these rough rice drafts. Nevertheless, the Bank held the drafts without dishonor for more than twenty-four hours. Under the Louisiana law then prevailing,[2] the Bank itself became liable for the drafts. On May 17, 1969, the Bank held more than $104,000 of such stale drafts. It called on Rex to cover and Rex immediately deposited $110,000 of NSF checks. The Bank then paid $104,000 of the stale drafts and charged Rex's account, only to discover that the checks Rex deposited were no good. Respondent paid the difference between the $104,000 and $110,000 as an appropriate loss under the bond but contended that the $104,000 paid by the Bank from its own funds resulted from the Bank's own failure to dishonor the rough rice drafts. This was not a loss covered by the respondent's bond. In short, respondent has contended that there was no loss resulting from the acceptance of the $104,-

2 La. R.S. 7:136, 137. These are taken from the Negotiable Instruments Law.

000 of NSF checks. The loss pre-existed the acceptance of those checks.

RESPONDENT CHALLENGES PETITIONER'S REASONS FOR GRANTING THE WRIT

1. No conflict exists between the decision in this case and the decisions of the Seventh and Eighth Circuits cited to the court.[3] In the instant case, there was an extension of credit upon the presentation of a collection draft which was admittedly incomplete when it was presented to the Bank. In extending credit on the drafts, Bank protected itself with a note. Interest was to be assessed from the day that the credit was given to the date of repayment. All of the elements of a loan were present in this transaction and the court so found. It was a factual finding on facts not present in the Seventh and Eighth Circuit cases.

The Seventh and Eighth Circuit cases dealt with check kiting schemes in which no notes were taken and no interest charges assessed. Checks, not collection items, were involved. All of the cases petitioner now cites were called to the attention of the Court of Appeals here and carefully considered by that court as its opinion reflects. The Court of Appeals for the Fifth Circuit went to pains to explain the difference between a check on the one hand, and a collection draft on the other, and why the two instruments called for differences of treatment. See the court's opinion reproduced in petitioner's brief on pages 16a, 17a, 28a, 29a, and 30a.

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3 *Supra*, note 1.

2. The only other ground for invoking the jurisdiction of this court is the complaint that the court erred in its findings of fact and conclusions of law with respect to the NSF checks. Petitioner speculates that perhaps it could have escaped liability on the stale drafts had it left them unpaid, but this speculation is diametrically opposed to the admission that Bank held the drafts for more than twenty-four hours without dishonor and that it was liable to the payees for the payment of those drafts. See Stipulation 36, set out on page 16 of petitioner's brief.

3. Many other questions involving viable defenses were urged by respondent in its appeal. The Court of Appeals dismissed petitioner's suit on the two defenses hereinbefore discussed and found no need to test the validity of the many other defenses. Respondent has not waived those defenses and this court could not finally dispose of this litigation adequately by issuing a writ of certiorari.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals is correct, that there is no conflict between it and the decisions of the Seventh and Eighth Circuits, and that the issues involved are not deserving of review by a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing Brief for Respondent in Opposition on Edmund M. Reggie, Esq., of Reggie, Harrington and Boswell, P.O. Drawer D, Crowley, Louisiana 70526, counsel for Louisiana Bank & Trust Company of Crowley, Louisiana, by U.S. Mail, postage prepaid, this ____ day of September, 1976.

MARIAN MAYER BERKETT